

THE  
NATIONAL LAW REVIEW

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## Delaware Chancery Court Holds Corporations Cannot Enact Federal Forum Provisions To Bypass Cyan and Preclude State Courts from Hearing Securities Act Claims

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Thursday, January 17, 2019

In 2017, courts across this country were split on whether plaintiffs could assert a class action alleging claims under the [Securities Act of 1933](#) (which provides a private right of action against issuers and others for providing false or misleading statements in offering materials) in state court. While California state courts recognized such jurisdiction, in New York, similar suits were routinely removed to federal court. In the midst of this jurisdictional uncertainty and prior to launching their respective initial public offerings, Blue Apron Holdings, Roku Inc., and Stitch Fix, Inc. adopted charter-based Federal Forum Provisions, in an attempt to make federal district courts the exclusive forum for the resolution of any complaint asserting claims arising under the Securities Act.

On March 20, 2018, a few months after the Federal Forum Provisions were put into place, the [U.S. Supreme Court](#) held that plaintiffs could assert class actions alleging solely claims under the Securities Act in state court (and that such suits are not removable to federal court). See [Cyan, Inc. v. Beaver County Employees Ret. Fund](#). Defendants, Roku and Stitch Fix, litigating in [Delaware's Court of Chancery](#), argued that the Federal Forum Provisions were nonetheless valid because "Cyan says nothing about Delaware law or forum selection charter provisions, and in no way restricts any person's ability to designate available forums for [Securities] Act claims through private ordering." Brief in Support of Cross-Motion for Summary Judgment at 11, [Sciabacucchi v. Salzberg](#), No. 2017-0931-JTL, 2018 Del. Ch. LEXIS 578 (Dec. 19, 2018).

On December 19, 2018, [Vice Chancellor J. Travis Laster](#), rejected Defendants' arguments and issued a decision in [Sciabacucchi](#), holding that such Federal Forum Provisions are invalid. Vice Chancellor Laster's decision is consistent with a 2013 ruling by then-Chancellor [Leo E. Strine](#) in the [Boilermakers](#) case.

While holding that specific forum selection bylaws, all of which pertained to "internal corporate governance," were proper, in dicta, the Boilermakers Court explained that a forum-selection bylaw could not regulate external matters such as tort and contract claims. Following the Boilermakers decision, there was debate as to whether charter and bylaw provisions could regulate other aspects of shareholder litigation. Boilermakers' codification into [Section 115 of the Delaware General Corporate Law](#) in 2015 did not provide further clarity. Vice Chancellor Laster's Sciabacucchi decision finally ended the debate, reasoning that for purposes of the Boilermakers analysis, a Securities Act claim resembles a tort or contract claim brought by a third-party plaintiff. Sciabacucchi was unequivocal that corporations could not restrict Securities Act class actions to federal court:

Under existing Delaware authority, a Delaware corporation does not have the power to adopt in its



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charter or bylaws a forum-selection provision that governs external claims. The Federal Forum Provisions purport to regulate the forum in which parties external to the corporation (purchasers of securities) can sue under a body of law external to the corporate contract (the [Securities] Act). They cannot accomplish that feat rendering the provisions ineffective.

To quell Defendants' concerns about the applicability of Boilermakers, Vice Chancellor Laster confirmed that the same result derives from first principles.

Sciabacucchi appears to have closed any loophole around the U.S. Supreme Court's decision in Cyan. As a result, the Plaintiffs' bar may continue to assert class actions alleging solely violations under the Securities Act in state courts across the country. The Defense Bar may be concerned that state courts are less familiar with federal securities actions and it remains unclear to what extent Defendants may benefit from application of the Private Securities Litigation Reform Act of 1995 and its procedural safeguards. The Plaintiffs' Bar has increasingly used California state courts to assert Securities Act claims and, on balance, state courts may well be more welcome to plaintiffs' claims. Notably, the limited data available suggests that a trend toward higher settlements of Securities Act cases in California state court may be emerging.

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